

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**June 15, 2001**

<b>PETITION OF MEMPHIS NETWORKX,</b>	)	
<b>LLC FOR APPROVAL OF A</b>	)	<b>DOCKET NO. 01-00091</b>
<b>TELECOMMUNICATIONS FRANCHISE</b>	)	
<b>WITH THE CITY OF MEMPHIS</b>	)	

---

**ORDER GRANTING PETITIONS TO INTERVENE OF  
SOUTHEASTERN COMPETITIVE CARRIERS ASSOCIATION  
AND BELL SOUTH TELECOMMUNICATIONS, INC.  
AND SETTING PRE-HEARING CONFERENCE**

---

Pursuant to the Order of the Tennessee Regulatory Authority ("Authority") entered on March 8, 2001, this matter is before the Pre-Hearing Officer for the purpose of establishing a procedural schedule, including the setting of a hearing date, and the handling of preliminary matters in preparation for a hearing.

**BACKGROUND**

This matter first came before the Authority during a regularly scheduled Authority Conference held on February 21, 2001 upon the filing of a *Petition for Approval* by Memphis Networkx, LLC ("Memphis Networkx") on January 29, 2001. The *Petition* seeks the Authority's approval, pursuant to Tenn. Code Ann. § 65-4-107, of Memphis Networkx's franchise agreement with the City of Memphis. At the Conference, the Directors voted unanimously to convene a contested case and appointed General Counsel to act as the Pre-Hearing Officer.<sup>1</sup>

---

<sup>1</sup> See *Order Convening a Contested Case and Appointing a Pre-Hearing Officer* (Mar. 8, 2001).

Time Warner Telecom of the Mid-South, L.P. (“Time Warner Telecom”) and the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter (“Consumer Advocate”) filed petitions to intervene on February 23, 2001 and February 28, 2001, respectively.

The Pre-Hearing Officer convened a Pre-Hearing Conference, on March 8, 2001, during which the petitions to intervene were granted and a procedural schedule was established. During the March 8, 2001 Pre-Hearing Conference, the Pre-Hearing Officer determined with the parties’ agreement that the Hearing in this matter would commence following the completion of the hearing in Docket No. 99-00909. On March 16, 2001, the Pre-Hearing Officer entered an *Order Granting Petitions to Intervene and Reflecting Action Taken at March 8, 2001 Pre-Hearing Conference*.

On March 16, 2001, the Southeastern Competitive Carriers Association (“SECCA”) filed a petition to intervene. In its petition, SECCA states that “[m]any members of SECCA are certified providers of competitive local telecommunications services and now offer, or may in the future offer, these services in Memphis and Shelby County.”<sup>2</sup> In addition to the petition, SECCA also filed comments in response to the *Petition for Approval*. In those comments, SECCA argues that “Section 21.1 of the agreement, which requires Memphis Networkx to pay a franchise fee ‘equal to 5% of Gross Revenue,’ and Section 20, which requires that Memphis Networkx give the city four optical fibers, are illegal under state law.”<sup>3</sup> Given these defects, according to SECCA, the franchise agreement does not “conserve the public interest” as required by Tenn. Code Ann. § 65-4-107.

---

<sup>2</sup> *Petition to Intervene*, p. 1 (March 16, 2001).

<sup>3</sup> *Comments of Southeastern Competitive Carriers Association on the Memphis Franchise*, p. 1 (March 16, 2001) (citing *City of Chattanooga v. BellSouth Telecomm., Inc.*, No. 03A01-9902-CV-00056, 2000 WL 122199 (Tenn. Ct. App. Jan. 26, 2000) and *City of Chattanooga v. BellSouth Telecomm., Inc.*, No. 1:96-cv-351 (E.D. Tenn. Oct. 24, 1997)).

On March 19, 2001, the Pre-Hearing Officer sent a letter to all parties to this proceeding as well as counsel for SECCA notifying the recipients of the filing of SECCA's petition and requiring the filing of responses no later than March 21, 2001. No responses were filed. Memphis Networkx submitted the pre-filed testimony of Ward Huddleston on March 21, 2001 in accordance with the procedural schedule, but that testimony did not address SECCA's arguments.

On March 22, 2001, BellSouth Telecommunications, Inc. ("BellSouth") filed a petition to intervene. BellSouth also argues that Sections 20 and 21 of the franchise agreement are illegal and, therefore, violate Tenn. Code Ann. § 65-4-107.<sup>4</sup> In addition, BellSouth contends that the franchise agreement is not a negotiated agreement, but instead a requirement of City of Memphis Ordinance No. 4404. BellSouth then argues that it is not permissible under state and federal law for a city to impose an agreement such as the one at issue here on telecommunications service providers.<sup>5</sup> BellSouth also contends that the franchise agreement may impinge on the Authority's exclusive jurisdiction to regulate telecommunications service providers at the state level.<sup>6</sup> Next, BellSouth argues that the franchise agreement violates Tenn. Code Ann. § 65-21-101, which grants telecommunications service providers the right to occupy rights-of-way.<sup>7</sup> BellSouth further contends that the enforcement of the franchise agreement contravenes the provisions of Section 253 of the Telecommunications Act of 1996.<sup>8</sup> As grounds for its petition

---

<sup>4</sup> See *Petition of BellSouth Telecommunications, Inc. for Leave to Intervene*, pp. 1-3 (Mar. 22, 2001).

<sup>5</sup> See *id.* at p. 2.

<sup>6</sup> See *id.* at pp. 2-3. BellSouth cites sections from the franchise agreement relating to preferential and discriminatory practices and services, Sections 29 and 30; the imposition of certain grounds for revocation of the Franchise Agreement by the city, Section 28.1; and the requirement in Ordinance 4404 of mandatory dispute resolution involving commercial arbitration, Section 23.3. See *id.* pp. 4-5.

<sup>7</sup> See *id.* at p. 3.

<sup>8</sup> See *id.* p. 4.

to intervene, BellSouth asserts that it has a direct interest in this case in that it provides services in Memphis, Tennessee and its intervention will not impair the interests of justice and these proceedings.

On March 23, 2001, Time Warner Telecom filed a letter in this docket. Time Warner Telecom explained that it did not intend to file a response to the petition, but reserved its right to participate in the proceeding. Time Warner Telecom also stated that it concurred with SECCA's and BellSouth's "substantive comments."<sup>9</sup>

The Pre-Hearing Officer next addressed this docket during a Pre-Hearing Conference in Docket No. 99-00909 on March 23, 2001. During that Conference, the Pre-Hearing Officer recognized that the arguments of SECCA and BellSouth directly call into question the propriety, if not the legality, of Ordinance 4404 of the City of Memphis. Moreover the pre-filed testimony of Ward Huddleston filed by Memphis Network did not address these arguments. For these reasons, the Pre-Hearing Officer determined that the City of Memphis should be provided an opportunity to intervene in this matter in order that the City might appear and respond to these arguments. The Pre-Hearing Officer also determined that the interests of justice would not be served by proceeding with the Hearing in this matter immediately following the Hearing in Docket No. 99-00909. In order to permit the parties an opportunity to adequately prepare their cases and to provide the Authority with a full presentation of the issues, the Pre-Hearing Officer ordered that the Hearing in this matter be continued.

The Hearing before the Authority in Docket No. 99-00909 concluded on March 27, 2001. At a regularly scheduled Authority Conference held on June 12, 2001, the Directors of the Authority voted unanimously to approve the Operating Agreement between Memphis Light, Gas

---

<sup>9</sup> See Letter dated March 23, 2001 on behalf of Time Warner Telecom (Mar. 23, 2001).

& Water and Memphis Broadband, LLC and granted a Certificate of Public Convenience and Necessity to Memphis Network.

### **SECCA'S AND BELL SOUTH'S PETITIONS TO INTERVENE**

Tenn. Code Ann. § 4-5-310(a) sets forth the following criteria for granting petitions to intervene:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

The Pre-Hearing Officer finds that the petitions of SECCA and BellSouth have been timely filed and have been properly served. The petitions substantiate that the legal interests of SECCA's members and of BellSouth may be determined in this matter. Also, SECCA and BellSouth do not request any action that would impair the interests of justice or the orderly and prompt conduct of this matter. Lastly, none of the parties have objected to the petitions. For these reasons, the Pre-Hearing Officer finds that the petitions are well-taken and should be granted.

### **FURTHER PROCEEDINGS:**


With the Authority's approval of the Operating Agreement and the grant of the CCN to Memphis Network, LLC this docket should now move forward toward resolution. For this reason, the Pre-Hearing Officer met with the parties immediately following the June 12, 2001 Authority Conference to set a date for a status conference. The parties agreed to the date and time of Wednesday, June 27, 2001 at 11:00 a.m.

Because the Pre-Hearing Officer has determined that the City of Memphis has an interest in this proceeding, this Order and a Notice of Pre-Hearing Conference is being sent to the City Attorney for the City of Memphis for the purpose of notifying the City of the status of this action and providing the opportunity to formally intervene and participate in this matter.

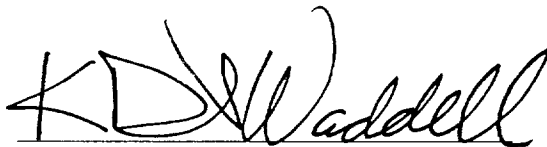
**IT IS THEREFORE ORDERED THAT:**

1) The Southeastern Competitive Carriers Association and BellSouth Telecommunications, Inc. are hereby given leave to intervene and participate in this proceeding as their interests may appear and receive copies of any notices, orders or other documents herein.

2) A Pre-Hearing Conference is scheduled for **Wednesday, June 27, 2001 at 11:00 a.m.** at the Offices of the Tennessee Regulatory Authority in Nashville, Tennessee.

  
J. Richard Collier  
Pre-Hearing Officer

ATTEST:

  
K. David Waddell, Executive Secretary